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U.S. Citizenship  
and Immigration  
Services

BS

FEB 12 2004

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:


Petitioner:  
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

For   
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary in the United States as a postdoctoral research associate. The director determined that the petitioner had not established that it had offered the beneficiary a qualifying, permanent position.

The appeal was filed on July 31, 2003. Subsequently, on August 7, 2003, the petitioner, through the same attorney, filed a motion to reopen with the director. The director properly dismissed this motion, stating that the earlier appeal had already removed the matter from the director's jurisdiction. Any new evidence submitted with this motion will be considered as a timely supplement to the appeal.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if --

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(i)(3) state that a petition for an outstanding professor or researcher must be accompanied by:

(i) Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. Such evidence shall consist of at least two of the following:

- (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
  - (B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;
  - (C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;
  - (D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
  - (E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or
  - (F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;
- (ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from former or current employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien; and
- (iii) An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:
- (A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;
  - (B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or
  - (C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

In a letter accompanying the petition, Professor [REDACTED] claims "full hiring authority for the position" and asserts "[t]he position is one of indefinite duration, the intention being for [the beneficiary] to continue working with us, contingent on satisfactory future performance and continued funding [REDACTED] specifies that the position "is 'permanent,' within the technical immigration meaning of the term," which in turn is describes as "of indefinite rather than fixed duration."

The complete regulatory definition, found at 8 C.F.R. § 204.5(i)(2), reads as follows:

*Permanent*, in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.

The lack of a fixed ending date is necessary, but not sufficient, to meet the above definition. Because postdoctoral research associate positions are generally seen as short-term training positions rather than permanent career appointments, the distinction is crucial in this proceeding.

The regulation at 8 C.F.R. § 204.5(i)(3)(iii)(B) requires that evidence of a job offer must be in the form of a letter from a United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field. A letter to CIS, describing the position, is not a letter offering the alien the position. The voluminous documentation submitted with the initial position does not include any actual job offer letter, nor any other documentation signed by both the beneficiary and an authorized official of the petitioning university, specifying the terms of employment and officially establishing the employer/employee relationship. The petitioner has produced no legally enforceable document showing that the petitioner cannot terminate the beneficiary's employment without cause. It cannot suffice for the petitioner simply to assert its intent to continue the beneficiary's employment.

On December 19, 2002, the director issued a request for evidence, asking the petitioner to submit further evidence to establish the qualifying nature of the job offer. In response, the petitioner has submitted a letter from Prof. Ching, addressed to the beneficiary and dated January 2, 2003. The letter reads, in pertinent part:

[T]his letter is to confirm your offer of employment.

The position we offer you . . . is a "permanent" position in that it is one of indefinite and unlimited duration; and one in which you should have an expectation of continued employment unless there is good cause for termination.

Thus, the position is considered as "employment-at-will" – that is, barring unforeseen developments, your position with the University may continue so long as your performance is satisfactory and subject to the usual business exigencies, such as continued funding.

On April 17, 2003, the director issued a second request for evidence, stating:

[W]e must see evidence that the university's hiring officials and human resources department consider the beneficiary's employment to be permanent rather than a typical, temporary postdoctoral position, a renewable annual contract, or other non-permanent and therefore non-qualifying type of employment. Therefore, please submit documentation to establish that the beneficiary has been offered a permanent research position **by the university**. While most university research positions may be permanent, the postdoctoral appointments to them are generally temporary in nature. You must clearly establish that the [petitioning university], and not just [redacted] intends for the beneficiary's employment by the university to be permanent.

Such documentation ought to be readily available from the university and can take many forms, for example:

- A contract between the university and the beneficiary which establishes that the beneficiary was offered a permanent position;
- Official university guidelines indicating that postdoctoral research associates are normally considered permanent employees;
- University documents indicating that, while postdoctoral positions are generally temporary, a specific, written exception had been made for this beneficiary; or,
- Verification from university human resources officials or administrators that Dr. [REDACTED] is authorized by the university to offer a permanent research position on the university's behalf.

[Emphasis in original.] In response, the petitioner submits none of the documents described in the director's request. Instead, the petitioner submits letters from counsel, who maintains that the position offered to the petitioner meets the regulatory definition of "permanent," and from Professor David Wieliczka, chair of the petitioner's Department of Physics. [REDACTED] states:

[REDACTED] has the full authority in making research appointments in his laboratory . . . which would be considered permanent, in that there is no fixed duration. . . . The nature, the duration, and the terms of the appointment will be determined by the specific needs of the research projects. . . . It is understood that such appointments can be continued indefinitely, assuming the continuity of . . . funding and the continued quality performance of the employee.

[REDACTED] letter, like [REDACTED] letter before it, relies on an incomplete definition of "permanent." As noted above, the definition requires more than simply the absence of a fixed ending date. The above letter suggests that employment in [REDACTED] laboratory is contingent on several factors. There remains no assurance from the petitioner that the beneficiary's employment cannot be terminated without good cause, and the petitioner has not submitted official documentation establishing the terms of employment. The petitioner has also failed to answer the director's observation that postdoctoral research associate positions are widely viewed as temporary appointments.

The director denied the petition, stating that the petitioner had failed to "establish that its hiring officials and human resources department consider the beneficiary's employment to be permanent rather than a typical, temporary postdoctoral position, a renewable annual contract, or other non-permanent and therefore non-qualifying type of employment."

On appeal, counsel argues at length that the petitioner's job offer to the beneficiary fully meets the complete regulatory definition. Counsel cites previously submitted exhibits, such as [REDACTED] letter of January 2, 2003, in which Prof. Ching asserted "the position is considered 'employment-at-will.'"

*Black's Law Dictionary* defines "employment at will" as "[e]mployment that is usu. undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause." *Id.* at 545 (7<sup>th</sup> ed. 1999). This definition is entirely consistent with the several conditions upon which the beneficiary's continued employment is contingent, but not with the regulatory definition of "permanent," which requires "good cause" for termination.

Counsel offers several tangential arguments. For instance, counsel asserts that "a position is only considered 'temporary' if it is of 'fixed duration' with no possibility or intention of continued employment under any

circumstances.” The pertinent regulations do not define “temporary,” and counsel cites no other specific source for the highly restrictive definition above. Furthermore, counsel relies on a false dichotomy, implying that any employment that does not strictly adhere to the counsel’s own definition of “temporary” must necessarily be “permanent.” This argument would apply only if counsel’s definition were exactly the opposite of the regulatory definition of “permanent,” which it is not.

On motion (here considered part of the appeal), among copies of previously submitted materials, the petitioner submits a letter from [REDACTED] Senior Human Resource Specialist at the petitioning university, who states that the beneficiary “is a full-time, benefit eligible Research Associate.” [REDACTED] adds that [REDACTED] has hiring authority in making research appointments in the laboratory.” [REDACTED] produces no first-hand documentation detailing the terms of the beneficiary’s employment, nor does she indicate that the petitioner cannot terminate the beneficiary’s employment without cause. This letter is consistent with [REDACTED] earlier description of the position as “employment-at-will.”

[REDACTED] in his latest letter, states that he has “never terminated a researcher for lack of research funding.” He does not indicate that the petitioner cannot terminate the beneficiary’s employment without cause; he only expresses his opinion that such termination is very unlikely.

Upon careful consideration of the evidence in the record, we find that the beneficiary’s appointment amounts to employment at will rather than permanent employment, and that the beneficiary’s employment is subject to several conditions, some defined, some undefined. The petitioner has not refuted or even addressed the director’s observation that postdoctoral appointments are generally short-term training positions rather than long-term appointments. [REDACTED] own postdoctoral position, according to his *curriculum vitae*, lasted no more than four years.) The record does not show that postdoctoral researchers at the petitioning university differ from the norm in this regard. The record also does not establish that the beneficiary holds a permanent position that the petitioner cannot terminate without cause, rather than an inherently temporary position that is likely to persist for the few years that most researchers remain in postdoctoral positions before moving on to other positions. Therefore, the petitioner has not established that it has offered the beneficiary a qualifying, permanent position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.